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No. 08-26

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In The Supreme Court of the United States

SAKAR INTERNATIONAL, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Corporate Disclosure Statement filed at p. ii of the petition for writ of certiorari on July 2, 2008, is still currently correct in that no parent or any publicly held company owns 10% or more of the petitioner corporation's stock within terms of the Court's Rule 29.6.

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PETITIONER'S REPLY BRIEF

1. Independent "embargo" law jurisdiction exists here for the CIT.

Contrary to respondent's contention at p. 7 of its Brief In Opposition ("Brief"), the court of appeals below ("CAFC ") has erroneously applied this Court's decision in *Kmart Corp. v. Cartier, Inc.*, 485 U.S. 176, 108 S. Ct. 950, 99 L. Ed. 2d 151 (1988), in rejecting Court of International Trade ("CIT") "embargo law" residual jurisdiction under 28 U.S.C. § 1581(i)(3) and (4). The CAFC decision conflicts with the Court's decision in *Kmart*, and conflicts with the CIT jurisdiction statute.

Contrary also to respondent's argument that the 19 U.S.C. § 1526(e) embargo ban is a mere mechanism by which a private party (trademark owner) might "enlist" the Government's aid in restricting the quantity of imports in order to enforce a private right, the § 1526(e) embargo-ban was mandated by Congress' own pre-emptive statutory 'enlistment' of a Governmental embargo. The § 1526(e) Government-generated embargo here is applied by its terms without any pre-requisite private party action (*i.e.*, no requirement of mark registration with USPTO and recordation with Customs that are required for § 1526(a) to operate). The 19 U.S.C. § 1526(a) statute discussed in *Kmart* is, on the other hand, wholly preconditioned, is completely individual private party trademark owner-generated, and is subjunctive in its express terms—it is a dependent *non*-embargo import regulatory law, dependent solely upon pre-requisite

private trademark owners' dual preliminary actions.[1] Any Customs enforcement action under § 1526(a) is consequently conditioned on, and authorized only when a protected trademark owner has first actively: (1) Registered its mark with the USPTO, and (2) Recorded its registered mark with Customs. Section 1526(e) relevant in this *Sakar* case however, is an *un*-preconditioned Government generated, imposed, and imperative embargo-ban in its terms that compel zero imports of counterfeit trademark goods—it is an independent embargo law.[2]

Kmart's non-embargo, pre-conditioned import restriction is wholly dependent upon prior specific individual trademark owner actions. *Sakar's* embargo-ban here in issue is operative by its terms *in*dependently of any trademark owner actions or inactions. *Kmart* and its § 1526(a) non-embargo majority holding does not apply to the § 1526(e) embargo-ban presented here in the *Sakar* case, contrary to the CAFC panel's holding below. That is because the un-adjudicated § 1526(e) embargo statute here with its expressly incorporated 15 U.S.C. § 1124 statutory provision establishes by its terms a compulsory Government ban within the Court's definition of "embargo" discussed (but not found) in *Kmart*, *ibid.* at 185. The incorporated section 1124 statute is plain in its pertinent terms: " ... *no [proscribed, counterfeit] article shall be admitted to entry* at any customhouse...." 15 U.S.C. § 1124 [Italics added].

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[1] *See* § 1526(*a*)

[2] *See* § 1526(*e*)

Kmart involved the validity of Customs' regulations governing the lawful admission (*permitting entry*) of trademarked genuine-goods parallel imports where district court jurisdiction was there sought and sustained for a facial challenge to the regulations. Unlike *Kmart* however, the present *Sakar* case seeks CIT judicial review of a specific *ultra vires* Customs HQ final administrative enforcement decision (*i.e.*, the fictionalized-"MSRP" Penalty imposition of December 29, 2005 now in issue) for embargoed goods. This case falls within statutory 28 U.S.C. § 1581(i)(3) and (4) exclusive CIT administration and enforcement jurisdiction over the § 1526(e) embargo-ban (*denying entry*) and expressly inter-related § 1526(f) penalty here that emanate from, "arise out of", the Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b.

There is no basis for respondent's contention, at p. 8 of its Brief, that § 1526(a) provides the "substantive prohibition" linkage to the independent, un-preconditioned § 1526(e) embargo here in issue. Instead, the appropriate substantive linkage actually comes from what the § 1526(e) statute itself expressly provides: "Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States *in violation of the provisions of section 1124 of Title 15, shall be seized...."* 19 U.S.C. § 1526(e) [emphases added]. A purported substantive prohibition linkage of the trademark-owner actuated dependent § 1526(a) import restriction provision to the independent § 1526(e) Governmentally imposed embargo here is therefore contrary to the § 1526(e) statute's own language that expressly refers to the

substantive § 1124 import ban, and is in conflict also with the definition of "embargo" set out in *Kmart*, 485 U.S. 176, 185 ("a governmentally imposed quantitative restriction—of zero—on the importation of merchasndise.").

Respondent also is wrong in suggesting at pp. 8-9 of its Brief, that the § 1526(e) legislative mandate of the Government's act of seizing violative goods is merely a "means" or "mechanism by which a private party might choose to enlist the government's aid ...." This argument overlooks that counterfeited goods are by law, per se legally, precluded from any entry—by mandated Government control under § 1526(e) and its incorporated § 1124 import ban. Thus § 1526(e) is not a "means"; it is an "end" provision. It is a free-standing, independent embargo-ban. Contrary further to the CAFC's holding below, the trademark owner here in *Sakar* does *not* retain any *Kmart*-styled "ultimate control" over whether or not "counterfeit" merchandise itself is imported under the § 1526(e) embargo ban in issue. The CAFC held otherwise below. That was incorrect. For if indeed counterfeit (*not* licensed or consented), the violative goods cannot in any event be lawfully entered into the customs territory under express statutory terms of the § 1526(e) embargo-ban: they "shall be" seized and destroyed, and in any event "...no article of ...[violative counterfeit merchandise] shall be admitted to entry at any customhouse...," under incorporated § 1124.

The CAFC decision here conflicts with the Court's definition of a governmentally imposed

"embargo" in *Kmart*, conflicts with the plain terms of the § 1526(e) embargo statute including its incorporation of the § 1124 entry ban, and thereby conflicts with the § 1581(i)(3) and (4) "embargo law" CIT residual jurisdiction statute.

2. "Revenue law" jurisdiction also exists here for the CIT.

The CAFC below also erroneously rejected CIT "revenue law" residual jurisdiction under 28 U.S.C. § 1581(i)(1) and (4), and conflicts with the circuit's own earlier decision in *Conoco* and with the residual jurisdiction statute.

Despite respondent's argument that, for subject matter jurisdiction, a case or dispute must somehow be "related to" monetary or duty revenue collection for imports or tonnage, the § 1581(i)(1) statute itself does not so provide in its given terms. Exclusive residual subject matter jurisdiction to the CIT exists here in that the present non-monetary claim for judicial review of Customs' administration and enforcement agency action in *Sakar* indeed "arises out of" of a federal law providing for revenue from imports or tonnage: the Tariff Act of 1930 in this case. Subsection 1581(i) and its paragraphs (1) and (4) provide a broad residual jurisdiction enactment that creates a basket of exclusive CIT jurisdiction that covers any "civil action commenced against the United States ... that *arises out of any law of the United States providing for—(1) revenue from imports or tonnage; ...; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and*

subsections (a)—(h) of this section." *Sakar* is such a civil action under § 1581(i)(1) and (4), and is a case that in any event conceivably touches and concerns import tonnage and perhaps revenue to the extent that both are reduced by an embargo denial of entry of accused goods. Respondent argues that the CAFC's 1994 decision in *Conoco v. U.S.*, 18 F.3d 1581, 1586 (Fed. Cir. 1994) somehow establishes or reflects a "relates to" revenue collection activity litmus test for § 1581(i)(1) jurisdiction purposes. The government curiously opposed CIT § 1581(i)(1) jurisdiction in the *Conoco* case, where the government's penchant for "jurisdictional ping-pong games" (see *Conoco* excerpts in petition at 23-26) nevertheless led to a CAFC grant of CIT § 1581(i)(1) and (4) jurisdiction for plaintiff Conoco in that FTZB agency administrative action case. With ping-pong style jurisdictional attacks by the government (in both the district court earlier and then also in the CIT in *Conoco*), it seems to become apparent that the government does not favor any one appropriate judicial forum over another as being legally correct or acceptable. The executive branch in general it seems does not favor any case for judicial review or supervision of any agency action in any forum at any time even though such review is strongly presumed by the courts.

Contrary to respondent's attempt to distinguish non-monetary or non-tariff claim cases at p. 11 of its Brief, the courts have readily accorded broad scope "revenue law" jurisdiction to agencies' purely administrative action cases (*i.e.*, non-tariff trade claims or disputes). In the first "revenue law" jurisdiction case to be decided by the CIT under the

Customs Courts Act of 1980, *Di Jub Leasing Corp. v. U.S.*, 1 CIT 42, 505 F. Supp. 1113 (1980), Judge Newman sets out the rationale for broad scope CIT residual jurisdiction under § 1581(i)(1) and (4) as follows:

> I have no doubt that, by the residual grant of jurisdictional authority in § 1581(i), *Congress intended to assure comprehensive review in this Court of a broad spectrum of administrative actions arising out of our international trade laws*, including those laws concerning the suspension or revocation of various customs licenses. Were the opposite true, it would frustrate a major Congressional goal of the Customs Courts Act of 1980 to "eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade." H.R.Rep.No.96-1235, at 47, U.S.Code Cong. & Admin.News 1980, p. 7118.
>
> Although generally, jurisdictional statutes are to be strictly construed,[FN3] *the legislative history of the residual jurisdictional provisions in section 1581(i) obviously evinces Congressional intent that these special provisions shall be accorded a broad construction*. H.R. 6394, the predecessor of H.R. 7540 (which became the Customs Courts Act of 1980), added a

> new section 1581(i) to Title 28, U.S.C., granting residual jurisdiction to this court. This section granted the Court jurisdiction over those civil actions which arise directly out of an import transaction and involve one *of the many international trade laws*. Significantly, in the proposed section 1581(i) of H.R. 7540, as amended, the specific listing of statutes in the residual provisions was eliminated *in favor of a broader "generic approach"*. Congress eschewed the listing of specific statutes in the residual provisions because it feared such listing "would result in an inadvertent omission of a statute, thereby creating further confusion in the minds of international trade law litigants". H.R.Rep.No.96-1235, 33-34, U.S.Code Cong. & Admin.News 1980, p. 7104. More, the language in proposed section 1581(i), as contained in section 201(a) of H.R. 6394, "arises directly from an import transaction", was deleted. Under proposed section 1581(i) of H.R. 7540, as amended, *"the Court of International Trade has jurisdiction over those civil actions which arise out of a law of the United States pertaining to international trade"*. H.R.Rep.No.96-1235, at 34, U.S.Code Cong. & Admin.News 1980, p. 7104.

Di Jub, *ibid.* at 1117. [Emphases added.]

Respondent omitted the above broad scope residual jurisdictional language used by Judge Newman in *Di Jub* from respondent's selected opinion-quotation at p. 11 of respondent's Brief argument. Thus the operative judicial rationale and Congressional intent as to the truly broad scope of § 1581(i)(1) jurisdictional coverage in *Di Jub* (a bonded cartman's license) was omitted from argument. Cases decided by the CIT subsequent to its 1980 *Di Jub* decision, and the CAFC's 1994 decision in *Conoco*, have effectively applied a wide scope to § 1581(i)(1) "revenue law" CIT residual jurisdiction, even if a stretch or nod to a "relates to" notion or potential effect upon revenue or tonnage was tucked into an opinion as a form of (advocated) comfort or shelter. *See such cases in petition at 22-23.* But those cases all reflect the reality that no monetary-specific claim or duty related dispute limitation is essentially required for CIT jurisdiction in administration and enforcement disputes "pertaining to international trade." Congress and the courts in turn have broadly granted § 1581(i)(1) and (4) residual basket subject matter jurisdiction for CIT judicial review of agency action on international trade subjects, including non-tariff disputes that nevertheless arise out of a law providing for revenue from imports or tonnage. No "relates to" test applies or needs any lip-service in order for CIT residual jurisdiction to obtain. See *Di Jub, Id., and related cases in petition at 22-26.*

The § 1581(i)(1) statute plainly provides jurisdiction for "any civil action...that arises out of any *law*...providing for—...revenue from imports or tonnage." [italics added]. Such a "law" is the entire

Tariff Act of 1930 (in our *Sakar* case), and indeed includes other federal international trade laws such as the Foreign Trade Zones Act of 1934, 19 U.S.C. § 81a *et seq.* (1988), that fall within the *"broad [§ 1581(i)] residual authority over civil actions arising out of federal statutes governing import transactions"* as held by the CAFC in *Conoco, ibid.* at 1588 [italics added]. The terms of the § 1581(i)(1) statute broadly provide CIT residual jurisdiction for all manner of customs and international trade cases ("In addition to" those already specified by Congress in subsections (a)-through-(h) of § 1581(i)) that lie against the United States or one of its agencies—including the present case for CIT judicial review of a final *ultra vires* Customs penalty Decision. *Sakar* thus fits properly here within the § 1581(i) jurisdiction of the national-scope CIT. Congress did not limit its § 1581(i)(1) "arises out of" subject matter jurisdiction language to any revenue-item based or monetary-claim or customs duty-collection management activity cases (or to any purported "relates to" test of same) in its statutory terms here in issue. Congress could easily have done so, but consciously did quite the opposite, as pointed out by CIT Judge Newman in *Di Jub, Id.* Congress chose instead to provide a broad residual basket of international trade subject matter jurisdiction for the CIT in § 1581(i).

Because of the unduly narrow (and erroneous we submit) restriction in its jurisdictional holding, the CAFC decision below here conflicts with the circuit's earlier 1994 decision in *Conoco*, and conflicts with Congress' "arises out of" enactment

language in the § 1581(i)(1) and (4) CIT residual international trade jurisdiction statute.

3. The CAFC rejection of the strong presumption of judicial review of agency action also conflicts with the Court's and with the DC Circuit's long standing judicial review precedents.

The CAFC's decision below conflicts with precedents of this Court and of the DC Circuit that hold a strong presumption of judicial review of agency action.

There is no merit as to respondent's contention at p. 12 of its Brief that "pre-enforcement judicial review" is sought here. A penalty collection action is for recovery of a debt. The agency's substantive HQ fictionalized-"MSRP" Penalty Decision of December 29, 2005, alleged to be *ultra vires* in this case, is different from and separable from a money-debt collection action under 28 U.S.C. § 1355 in a localized district court. National-scope CIT judicial review is warranted here as to Customs' final substantive HQ Penalty Decision in issue. Customs has exercised its 19 U.S.C. § 1526(f)(4) discretion for "imposition of a fine" in this case. The agency's December 29, 2005 HQ decision contained the agency's described "final" 30-day demand that petitioner Sakar pay the $67,775 fine. Customs stated in its December 29, 2005 Decision notice as follows: "*Please be advised that this decision constitutes the final administrative review analysis available under the provisions of Part 171 of the Customs Regulations. No further petitions will be*

accepted." CAFC A 59-61, at 59. Thus all of Customs' substantive legal deliberations in this fully briefed, twice-reviewed HQ penalty case had been completely finished and made final. Customs demanded that its penalty money be paid, and be paid quickly by petitioner Sakar within 30 days. Case finality is present here for this "administration and enforcement" action for CIT judicial review as measured under the Court's justiciability elements set out in *Bennett v. Spear*, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163, 137 L. Ed. 2d 281 (1997) (final agency deliberative-decisional action on the legal merits, adverse legal injury of *ultra vires* penalty liability, redressability by judicial review and declaratory judgment relief, and ripeness for judicial review).

The Court has held in *Bowen v. Mich. Academy of Family Physicians et al.*, 476 U.S. 667, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986) that agency action is subject to a "...strong presumption that Congress intends judicial review of administrative action," and cited *Marbury v. Madison*, 1 Cranch 137 (1803) and succeeding cases in support, 476 U.S. at 670, 106 S. Ct. at 2135-36.

The DC Circuit's decision in *Ciba-Geigy Corp. v. U.S. [EPA]*, 801 F.2d 430, 434 (D.C. Cir. 1986) applied a pragmatic balancing standard as to finality of agency action. Here, Sakar was given 30 days in which to pay up the wrongful $67,775 *ultra vires* fictionalized-MSRP Penalty fine, or to suffer[3] a consequent liability of a more than five-times-larger "full," but equally and originally *ultra vires*,

[3] *See* 19 C.F.R. § 171.22

$381,500 fictionalized-"MSRP" Penalty fine. This occurs where it is undisputed that no MSRP (nor any promulgation of any agency regulation for MSRP 'determination' basis that is specifically required by 19 U.S.C. § 1526(f)) factually exists anywhere in this case as to any goods anywhere, whether accused imported or domestic. As noted at p. 10 of the petition's statement of the case, a "... presumption of reviewability [exists], especially when the affected person is confronted with the dilemma of choosing between disadvantageous compliance or risking imposition of serious penalties." *Ciba-Geigy*, at 434. This is such a case.

The CAFC decision below is in conflict with this Court's strong presumption of judicial review of agency action reflected in *Bowen*, and is in conflict with the DC Circuit's reviewability holding in *Ciba-Geigy*.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted:

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October 3rd, 2008

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APPENDIX

19 U.S.C. § 1526(a), (e)

(a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

* * *

(e) Merchandise bearing counterfeit mark; seizure and forfeiture disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of Title 15) imported into the United States in violation of the provisions of section 1124 of Title 15, shall be seized and, in the absence of the written consent of the trademark owner, forefeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the

merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized—

> (1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,
>
> (2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or
>
> (3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2).

19 C.F.R. § 171.22

A decision to mitigate a penalty or to remit a forfeiture upon condition that a stated amount is paid will be effective for not more than 60 days from the date of notice to the petitioner of such decision unless the decision itself prescribes a different effective period. If payment of the stated amount or arrangements for such payment are not made, or a supplemental petition is not filed in accordance with

regulation, the full penalty or claim for forfeiture will be deemed applicable and will be enforced by promptly referring the matter, after required collection action, if appropriate, to the appropriate Office of the Chief Counsel for preparation for referral to the Department of Justice unless other action has been directed by the Commissioner of Customs.